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Walled Gardens & the Stationers' Company 2.0

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Abstract
Copyright law originated as a law designed to regulate the commerce of printing, not as a law designed to protect the interests of authors. The Statute of Anne changed this by vesting copyright with the author and thereby creating the possibility of pre-publication negotiations. Today that bargain is being broken. In our era of cloud-computing and Web 2.0, non-author intermediaries provide platforms that constitute the tools of authorship, the tools of publicity, and the tools of commercial distribution. Within this new ecosystem, we are seeing a return to the model of the Stationers' Company, where legal power over authorial production is vested in the hands of the owners of intermediary technologies. The future of digital copyright thus increasingly resembles a return to its early history, as authors play the legal role of vassals beholden to the lords of the platforms where they labor.

Keywords
web 2.0, user-generated content

Topic
copyright

«Jardines vallados» y la Stationers' Company 2.0

Resumen
El derecho de autor nació para regular el comercio de las obras impresas, no para proteger los intereses de los autores. El Statute of Anne vino a cambiar esta situación, confiriendo los derechos al autor, lo que creó la posibilidad de entablar negociaciones previas a la publicación. Hoy en día, este pacto se

está rompiendo. En nuestra era de computación en la nube y de la Web 2.0, intermediarios no autores proporcionan plataformas que constituyen las herramientas para la autoría, la publicidad y la distribución comercial. En este nuevo ecosistema vemos un regreso al modelo de la Stationers' Company, donde las facultades legales sobre la producción de los autores se atribuye a los dueños de las tecnologías intermediarias. De este modo, el futuro del derecho de autor en el entorno digital parece cada vez más un retorno a su época histórica original, donde los autores juegan el papel de vasallos sometidos a los señores de las plataformas en que trabajan.

Palabras clave
web 2.0, contenido generado por el usuario

Tema
derechos de autor

1. Introduction

1.1. Lessons from the Virtual Frontier

My recent book *Virtual Justice* describes the intersection of law and virtual worlds such as *World of Warcraft* and *Second Life* (Lastowka, 2010). The law of these technologies may seem like a very specific subject, yet in fact virtual worlds are like a small puddle that, when viewed at the right angle, reflects a much broader universe. Here I want to describe how considering the law of virtual worlds led me to worry about the future of copyright law.

While virtual worlds are novel technologies, the way they are shaping law is not unprecedented. In *Virtual Justice*, I analogized virtual worlds to castles. Castles were new technologies that disrupted society, solved some pressing social problems, created new problems, led to new forms of culture, and enabled new forms of authority (Janin, 2004). Castles led to new systems of law: new courts, new jurisdictions, new notions of property, and new legal framings of relationships. Castles were also a technology used by their owners to offer an alternative to the existing system of government. The same things might be said of virtual worlds.

Although *Virtual Justice* touched on many fields of law, I avoided one topic until the last chapter: copyright. This was not because I thought copyright was unimportant to virtual worlds, but because it was too important. Indeed, whenever I talked with legal audiences about virtual worlds, it seemed someone always asked: "Doesn't copyright provide the answer to the problem you are discussing?" But how could copyright "solve" virtual law? The thinking went like this: a virtual world is a creative work made of software. Copyright accords authors of creative works the power to control the disposition of their work. So, just as an author such as J. K. Rowling has (in theory) absolute control over the uses of her stories, so the owner of a virtual world should have absolute control over everything that occurs in the virtual environment. All problems are thusly solved.

That reasoning never sat well with me. As a copyright specialist, I knew that copyright was not created to be a system of governance. So, in my book, I front-loaded the many problems in virtual worlds that copyright fails to answer. For instance, if an avatar is defamed in a virtual world, copyright does not provide a solution to that legal problem. Similarly, if two users of a virtual world form a contract but are located in distant jurisdictions, copyright provides no answer to the jurisdictional problems in that situation. Finally, if a hacker writes a malicious piece of code that loots the virtual currency in player accounts and then sells that currency for a profit, copyright law does not address the harm done to the victims of the virtual theft or the tax consequences for the hacker of acquiring and selling virtual goods.

In truth, I was so eager to focus on all these problems that I spent precious little time talking about copyright in virtual worlds. Yet, like the narrator in Poe's "The Tell-Tale Heart," I feel my efforts to bury the intersection of copyright law and virtual worlds have now made that intersection loom large in my mind. I realize I may have overreacted to the tendered "solution"—perhaps copyright law is our future system of virtual governance?

1.2. Copyright law in virtual worlds

If you think about it, copyright law permeates all aspects of virtual worlds in amazing ways. Consider, if you will, a social event held in a real walled garden. As long as no one is recording the garden party (a dubious assumption in this age of ubiquitous smart phones), the party would have no copyright implications. A walled garden – even a very nice walled garden – is not subject to copyright protection, I would think (Hunter, 2005).

Now consider a social event held in a walled garden in *Second Life*. A *Second Life* garden is a synthetic production that includes 2D textures, 3D sculptures, animations, sounds, computer scripting, and perhaps other creative elements. All these elements might be subject to separate copyrights. Additionally, once they are merged together, these elements are presented to the attendees by the client and server software of *Second Life*, which is protected by copyright and must be licensed to be legally loaded onto a user's computer.

Attendees themselves are garbed in copyright. To construct their social selves in *Second Life*, they use copyright-protected components and merge their own creative labor with them to fabricate copyright-protected bodies adorned in copyright-protected clothing, moving via copyright-protected animations.

If, during the *Second Life* event, attendees express themselves in this walled garden – if they chat, draw, philosophize, move objects about – those contributions may also fall within the ambit of copyright. To the extent that more sophisticated tools (e.g. embedded video) are provided, as they are in *Second Life*, these may invoke even more concerns about copyright. What I found in my study of virtual worlds is that when one puts people together online in a tool-rich environment, the result is essentially an artist's colony. People will talk by making things and socialize by collaborating on authorial projects (Benkler, 2006).

And here's the curious part of the copyright story: most of the copyright-protected content created by users will be owned (or at least licensed) by the platform on which the users create. In some cases, platforms may even require the assignment of the user's copyright interest. This fact dawned on me toward the end of *Virtual Justice*, leading me to conclude the book on this note:

> "Virtual worlds are often rich and complex artistic creations, so their protection under the aegis of copyright is certainly deserved. In the case of the user, however, copyright law is more often perceived as a source of risk that needs to be defused and harnessed in ways that serve the interests of those who are monetizing the platforms. Like peasants tilling fields around a medieval castle, users will lend their copyright labor and creativity in ways that build the value of the virtual world platform, often paying for the privilege to do so."

1.3. Broadening the frame: User-generated content

Of course, virtual worlds are hardly the only places where people create content online. In many online communities today, we see exactly the same sorts of sharing, creating, and entertaining taking place. For instance, take all the photography posted on Flickr. Recently, the Dutch photographer Erik Kessels created an installation in which he printed out all the photos uploaded in one day on Flickr. The piles were huge. Just seeing them, one realizes the impossibility of ever looking at a full day's output of Flickr. Apparently, as of 2011, six billion photographs had been posted to Flickr. Similarly, YouTube proudly proclaims that over 4,000 minutes of video are uploaded every minute. It is impossible for anyone to watch even one percent of the content YouTube is hosting.

While these statistics are mind-boggling, consider all the other forms of content created and shared online: Twitter tweets, blogs, recipes, lolcats, open-source software, music, fan fiction, knitting patterns, home remedies, law review articles, even simple web pages.

And, of course, there is Facebook. Apparently, three billion new photographs are uploaded to Facebook every month, making it more than a rival for Flickr. Facebook is not a virtual world as I define that term, but it certainly does consist of people trying to socialize by expressing themselves and entertaining each other with new content.

What do we make of this? So far, it seems the law pays very little attention. The traditional copyright industries have very little to gain from engaging with the phenomenon of user-generated content, and those are the industries that employ lawyers. To the extent attention is paid, it is largely negative. If it does nothing else, amateur creativity interferes with how the entertainment industry views itself.

Critics like Andrew Keen, Mark Helprin and many others have warned that the growing wave of user-generated content undermines the cultural status and economic model of professional creators (Keen, 2008; Helprin, 2009).

In the copyright industry model, the public consumes the content sold by those who pay creative professionals. This is how copyright law works today. However, the user-generated content model is different, since so much of it is produced without the expectation of profit. This shift is significant, because if consumer attention remains a constant, industrial copyright should anticipate a diminished role in culture. The audience will entertain itself. It may even pay to entertain itself. And this creates a business opportunity for the platforms – virtual worlds, Flickr, YouTube, Facebook, and many, many others – that provide tools, host content, insert advertisements, track user behaviors, and search for other ways to monetize their position.

1.4. User-generated content and copyright law

For the time being, I will remain agnostic about the normative valence of user-generated content. Some people, such as Andrew Keen, present it as a cultural apocalypse, while others herald it as the dawn of a new age of participatory, peer-produced, many-to-many, remix, prosumer, free wiki, crowdsourced culture (Benkler, 2006; Lessig, 2008; Shirky, 2010). As more moderate voices have explained, it's likely a little bit of both. I will not attempt to delve into that nuance here.

What I want to state is that this shift toward amateur creativity is incredibly important—culturally. Economically, user-generated content seems to be quite important in the aggregate, though obviously if we take the individual pieces we're seeing, each individual work seems economically very unimportant. The average Flickr photo, the average YouTube video, the average blog post or *Second Life* skin or *Minecraft* world, isn't making any money at all. Copyright lawyers are not going to get rich any day soon from representing UGC creators. If copyright lawyers don't see potential for lawyerly employment with regard to these works, the odds are they don't see much copyright law in these works either.

The legal money in digital copyright today is spent shaping a new set of laws for online piracy, not a new set of laws for user-generated content. The divorce between digital technology and the means of creative production is generating a lot more noise than this strange new and harmonious marriage. But I worry that when we focus exclusively on new laws to stop piracy, we miss something vital about the shift in copyright. This emerging maelstrom of human creativity is the true genius of the Internet and the true source of its economic value. We're still in the very early stages of harnessing its power and peculiar characteristics. The law should be paying more attention to how copyrights – even these "marginal" copyrights – are being affected by the shift.

2. Whither authors?

2.1. The historic purpose of copyright

Copyright, as we all know, was a law that responded to a particular technology of reproduction. And the first response, in England at least, was one that enabled a powerful commercial guild, the London Stationers' Company, to exercise a monopoly power over "copy right" that had little to do with the goal of protecting the rights of creative authors (Lowenstein, 2002; Patterson, 1968; Rose, 1993). The contemporary system of copyright in the United Kingdom, and in the United States by later adoption, is a system that originated from the Statute of Anne, which ostensibly amended that pre-existing "copy right" to create a right for authors, not publishers.

However the law was created, according to some, it was primarily a political strategy by the Stationers' Company to perpetuate the monopoly that it had earlier enjoyed. The history is complex and not entirely clear, but it is commonly accepted that the practical origins of copyright law in the English and American systems had little to do with providing economic rewards for creativity. Nevertheless, we consistently declare today that the law of copyright is about rewarding authors, not intermediaries.

Could it be that Web 2.0 is turning back the clock? I worry that this might be the case. With respect to virtual worlds and other platforms, copyright seems to be transforming into a tool aimed at authors and designed to harvest their labor. This is particularly true with regard to the ever-growing cornucopia of amateur creativity. To illustrate this, I want to talk about four cases that sit at the intersection of user-generated content and copyright law. The first two of these cases – the two I discuss at greater length in the last chapter of *Virtual Justice* – involve virtual worlds.

These are, I admit, rather strange cases. Three out of the four involve companies fighting over the legality of user behaviors despite the fact that the users are not parties

to the litigation. But I think these cases do suggest that platforms may be in the process of forming of a new legal status quo with regard to user-generated content—a status quo we should find troubling.

2.2. Marvel v. NCSoft: Copyright as a limit on creativity

City of Heroes was a virtual world that offered players, as the title suggests, the ability to become a superhero. One of the game's main selling points was a tool set that allowed players to design their own superhero costumes. Indeed, some people played *City of Heroes* primarily to use this "Character Creation Engine." They played primarily by making new costumes and showing them off during fashion contests in the virtual world. But copyright law made this tool problematic. Marvel Comics, the owner of the X-men and other superhero intellectual properties, alleged that users were making avatars that resembled Marvel-owned characters. So Marvel sued the game creators, NCSoft and Cryptic Studios, for enabling *City of Heroes* players to create infringing superheroes.

The defendants attempted to dismiss the case, arguing that there was no way that providing creative tools to game players could constitute copyright infringement. However, the *Marvel* case survived that motion to dismiss, and the parties later entered into an undisclosed settlement.

The *Marvel* case might seem, at first glance, similar to other cases involving platforms, like Napster or YouTube, where a defendant is hosting material that infringes copyright law. Hosts of online content are regularly dragged into disputes between their users and copyright owners. In most cases in the United States, the safe harbor provision of the Digital Millennium Copyright Act can be invoked to avoid liability. If the intermediary follows proper procedures and removes the infringing content upon receiving notice, infringement liability can be avoided.

However, the *City of Heroes* case was somewhat different. The defendants did not just host the content claimed to be infringing. They provided the tools players used to create that content. And the players did not just create atomistic pieces of content that were uploaded to the servers of the defendants. They used the defendant's highly customized software to make avatars that were consistent with the defendant's world and which were viewed by other players within the context of the virtual world.

The *Marvel v. NCSoft* case illustrates several points. First, we can see that certain forms of authorship today can be enabled and hosted by online platforms in more complex and unprecedented ways—the player authors here were clearly building out the value of the platform in a novel way. Second, it is notable that the avatars created - some of which Marvel claimed infringed copyright law - were created without any expectation of commercialization. Indeed, according to the terms of service on the defendants' site, the copyright in the player creations was owned by the defendants, not the players. Third, Marvel's suit against the defendants did not just threaten to prevent players from creating copyright infringements. It also threatened to remove their ability to create non-infringing content.

It seems odd to think that copyright could be used as a means to keep certain creative tools out of the hands of the public, but that's exactly what Marvel's lawsuit threatened to do—and perhaps could have done if the case had not settled. Is removing creative tools from the hands of the public a proper function of copyright law? I would argue that it is not—the *Marvel* case is therefore problematic as a harbinger of copyright's intersection with user-generated content.

2.3. MDY v. Blizzard Entertainment: Copyright as governance

The *MDY v. Blizzard* case was recently litigated in California and it concerned creativity within another virtual world: *World of Warcraft*. Michael Donnelly is a computer programmer who wrote and sold a program called Glider. Glider functioned to automate avatar activities in *Warcraft*. So, for instance, if you wanted your avatar in the game to mine the landscape for precious metals, Glider would automate that process for you, allowing you to sleep while your avatar labored for hours on end.

Because some player tasks in *World of Warcraft*, like mining, can be both profitable and boring, Glider was a popular program. Donnelly's company actually made millions of dollars in sales. Surely a contributing factor for this success was that some of the profits of mining and other repetitive activities could be translated into real world profits. So those in the business of gold farming (selling virtual goods for real money) likely constituted a substantial portion - though certainly not all - of Donnelly's customers.

For a variety of reasons, Blizzard was not enthusiastic about commercial gold farming or avatar automation. The primary

rationale given by the company was that Glider ruined the environment of the game for players. So Blizzard threatened to sue Donnelly if he did not cease selling the software. Donnelly instead preemptively filed suit against Blizzard, seeking a declaration that his business was legal.

Among the counter-claims Blizzard brought against Donnelly were two copyright-based claims. First, Blizzard argued that when players engaged in "botting" with the Glider software, this was a violation of its terms of service and its end-user license agreement. It followed that because players used the game's software pursuant to a copyright license, these contractual breaches could put botters outside the scope of the license, hence triggering copyright infringements. Essentially, Blizzard was attempting to use copyright law as a means to specify what players could and could not do while using its software.

Blizzard's second copyright-based argument was that the Glider software, by evading the detection of Blizzard's anti-botting software, granted players access to the copyright-protected work of Blizzard. Blizzard had, in fact, attempted to use a piece of software, Warden, to detect those players who were using Glider software and to prevent them from accessing Blizzard's service. However, Donnelly had managed to rewrite Glider to avoid detection by the Warden program.

To make its claim, Blizzard relied on the 1998 Digital Millennium Copyright Act (the DMCA), a law that prohibits the circumvention of digital rights management technologies to obtain access to works protected by copyright. Blizzard claimed that by selling a botting program that evaded Warden, Donnelly had trafficked in circumvention tools in violation of the DMCA.

The district court ruled in favor of Blizzard on both copyright claims. On appeal, the Ninth Circuit reversed with regard to the first claim, explaining that the anti-botting contractual provision was directed at setting rules of game play and was not intended by the parties as a copyright-related restriction on use of the software. However, the Ninth Circuit upheld the infringement ruling with respect to the circumvention of the Warden anti-botting software.

This short description does not do justice to the difficult issues in *MDY*, but my purpose here is not to lay out the doctrinal complexity of copyright law and licensing. I simply want to point out the strange way that copyright law was applied in this case. Copyright is supposed to encourage the development of new creative works and to prevent others from copying and performing those works. In the *MDY* case, the alleged player infringers were simply users of the software who acted in a manner the virtual world owner disfavored. The goal of the case was to prevent the distribution and use of a creative piece of software that served the needs of a market and which did not duplicate the copyright-protected work.

In other words, the MDY case shows that my instincts about the nature of copyright law may have been wrong. Copyright may indeed be a law of community governance.

2.4. Power Ventures: Copyright as walled garden

My third example concerns a lawsuit brought by Facebook against Power.com, a now-defunct company that at one time offered users a means to access various social networking services from a single platform. In order to aggregate various forms of user data across platforms, Power.com asked users to authorize it to access their accounts on various platforms.

Power.com initially sought to negotiate with Facebook to obtain access to user accounts, but the negotiations were unsuccessful. Ultimately, Facebook attempted to block Power.com's access to the platform in much in the same way that Blizzard attempted to block MDY's Glider from interacting with *World of Warcraft*. And just as MDY sought to evade blocking, so Power.com developed strategies to evade Facebook's blocking efforts. Like Blizzard, Facebook brought claims under copyright law and the DMCA against Power.com.

What was curious about the Power.com case is that Facebook, unlike Blizzard, is primarily in the business of providing a platform for users who share information. Facebook is not a content provider, it is a conduit for content. There is very little visible authorial creativity on the Facebook website beyond the content added by users. In its complaint, Facebook failed to specify what work copyright Power.com had infringed by accessing the platform. Despite this, when Power.com moved to dismiss Facebook's claims, the court sided with Facebook. It stated: "Facebook owns the copyright to any page within its system, including the material located on those pages besides user content, such as graphics, video and sound files. Defendants need only access and copy one page to commit copyright infringement."

Additionally, the court found credible Facebook's claim that its own users had violated its copyright by authorizing Power.com to access the Facebook site. It stated that if the facts alleged by Facebook were true, "When a Facebook user directs Power.com to access the Facebook website, an unauthorized copy of the user's profile page is created. The creation of that unauthorized copy through the use of Defendants' software may constitute copyright infringement." Thus, again, users of a platform – users who actually create the valuable content on the platform – were found to be potential infringers of copyright law by virtue of the copyright interest held by the platform. Copyright law was once again flipped against the users who provided the creativity that made the platform valuable.

2.5. Turnitin: Copyserfs

My last case, *A.V. v. iParadigms*, is perhaps slightly less strange than the prior cases in that the user-creators who were not present in the prior cases were the plaintiffs in this one. Copyright law is supposed to work this way-creators are supposed to pit themselves against putative infringers. What made this case unusual, however, was that the platform owner, in this case a company named iParadigms, argued that it had a right to commercialize copyright-protected works without needing to compensate the authors of those works. The authors had not volunteered to allow iParadigms to do this; they were students who wrote papers for their high-school classes and were required by their school to submit their work to the defendants' for-profit service. The function of Turnitin brings to mind the censorial goals of the copyright system in the 17th century: student papers were checked for plagiarism and then added to the Turnitin database to detect potential future plagiarism.

If the students failed to use the defendants' service, they would receive a zero grade for their paper assignments, so their educational success was conditioned on waiving their authorial rights. In order to use the service, the plaintiffs were required to submit to the terms of service of the Turnitin website by clicking an "I agree" button. The students submitted the papers, as they were required to do, but they (inventively) included "disclaimers" stating that they did not consent to the defendant platform's archiving of their works. Nevertheless, the works were added to the defendants' commercial database.

So the students turned to copyright law for protection. They lost.

The court found that the unauthorized use of the students work did not amount to copyright infringement. It found that Turnitin's contractual terms barred their lawsuit – despite the fact that the students were required to submit their papers in order to receive a passing grade, and despite the fact that the students were minors and presumably incapable of entering into a contractual assignment of their authorial interests.

The court also found that the use of the student papers in a for-profit plagiarism detection service was a "fair use" that fell outside the scope of the plaintiffs legal control. Finally, it found plausible the claim by iParadigms that, by accessing its services in a manner that exceeded the scope of the license agreement, the students might have violated federal criminal law.

Some commentators viewed the Turnitin case as a victory for fair use in copyright law. Here, though, I simply want to note how, once again, a platform successfully divested creators of their intellectual property rights, and profited by doing so.

Where is copyright law headed?

2.6. Conclusion

Four cases may not constitute a trend in the law. My concern, however, is that amateur authors using Web 2.0 platforms will have negligible authorial rights. This is a problem– or at least it should be. Copyright, after the era of the Stationers' Company, was supposed to be a law protecting authors and giving them new leverage against information intermediaries. What we are seeing emerge with respect to the Web 2.0 era is something much more like the copyright law that preceded the Statute of Anne.

Copyright may be becoming a law that primarily benefits publishers at the expense of the authors. Indeed, three of these cases managed to exclude the creative public from the litigation entirely, while at the same time framing them as copyright infringers. While I first spotted this trend in virtual worlds, it seems to characterize all platforms that host popular creativity.

Online, it seems copyright is losing sight of the author and transforming itself into a law of intermediary privilege. The future of copyright may well be the past.

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